Filed 5/4/18 In re O.R. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re O.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. O.R., Defendant and Appellant.	A149922 (Napa County Super. Ct. No. JV18392)

O.R. (Minor) appeals from a judgment of the juvenile court finding he made a criminal threat (Penal Code, § 422), and unlawfully possessed cigarettes (former § 308, subd. (b)).[1] On appeal, Minor contends "he did not state a 'true threat' which would constitute unprotected speech under the First Amendment." Minor also challenges the juvenile court's electronics search condition, contending it is both invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and "unconstitutionally overbroad." We vacate the juvenile court's true finding that Minor unlawfully possessed cigarettes, and we otherwise affirm.

[1] All undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts relevant to the issues on appeal. We provide additional factual and procedural details in the discussion of Minor's specific claims.

The Teacher's Testimony

E.W. (Teacher) worked at a middle school in Napa, California. Minor was one of his students. Teacher's classroom had a metal detector to prevent students bringing weapons into the classroom.

On October 4, 2016, Teacher was standing on the porch to the classroom, when he observed Minor arriving to school at about 9:25 a.m. Minor was late for class. As he walked toward the classroom, Minor dropped something. He picked it up, and then walked toward the school office. Teacher approached Minor because he was late for a test.

Minor resisted going to the classroom, stating he wanted to talk to Ms. Wilson, the school's director, in the school office. Minor's demeanor was "[d]efiant," and he appeared "[s]lightly agitated," worried, and "under some kind of stress." Minor eventually went with Teacher, but when Minor passed through the metal detector it "went off," indicating he was carrying something metallic. Teacher worried Minor might have a weapon, but Minor refused to remove the item from his waistband. Minor became "[i]ncreasingly defiant and agitated." He was "[c]lenching his fist," "[p]acing," and he "had an attitude."

Teacher walked Minor out of the classroom. Minor was "[c]lenching [his] fists, glaring at [Teacher], muttering, [and] cussing." Minor stated: "Fuck this. This is stupid. Fuck this school." Teacher was concerned because he had previously seen Minor "punch walls . . . out of anger." Minor "hit the outside of the school with his elbow extremely hard," making a "very loud sound." Teacher called for assistance.

Deputy Albert Washington, a deputy with the Napa County Sheriff's Department, was assigned to the Napa County Office of Education as a school resource officer. His responsibilities included the safety of students and staff at Minor's middle school. Deputy Washington responded to Teacher's call, and he took Minor away from the

classroom. Later the same day, Deputy Washington told Teacher that Minor threatened to kill Teacher. Teacher was scared because Minor displayed "a lack of mental stability over the course of weeks leading up to this." Teacher considered it a "distinct possibility" Minor could be violent towards him. Teacher was aware Minor had been referred to social workers and counselors as a result of prior conduct, and Teacher was concerned for his safety because Minor's behavior was escalating from previous experiences with him. Nonetheless, Minor did not personally threaten Teacher, and Teacher had no recollection of a prior incident where Minor was accused of threatening to hit him.

The Deputy's Testimony

About a week earlier, on September 27, 2016, Deputy Washington observed Minor sitting on a bench outside his classroom. Minor looked angry and upset. Minor told the deputy he had been asked to leave the classroom for threatening to hit his teacher. Deputy Washington spoke with Teacher, who seemed concerned. Deputy Washington explained to Minor that he could get into trouble for threatening the staff.

On the morning of October 4, 2016, Deputy Washington heard Teacher call for assistance over the radio. Deputy Washington walked to Teacher's classroom, where Teacher and Minor were standing on the porch. Minor was leaning against the wall, "had both of his fists clenched, and he appeared to be angry." Teacher explained to the deputy that the metal detector went off, but Minor refused to reveal what was in his waistband. Deputy Washington was concerned Minor had a weapon. When Deputy Washington searched Minor, a clear plastic bag containing cigarettes and three lighters fell from Minor's waistband. Deputy Washington did not find any weapons.

Deputy Washington walked Minor to the front of the school, toward the deputy's office. Deputy Washington intended to send Minor for "another counseling session," and to issue a citation for possession of the cigarettes. Then Minor stated: "I'm going to kill that motherfucker." Deputy Washington asked Minor if he was talking about Teacher, and Minor said yes.

Deputy Washington arrested Minor, and Minor was taken to Napa County Juvenile Hall. Deputy Washington had prior conversations with Minor about threatening Teacher and other staff, and he was concerned Minor might follow through on his threat. Deputy Washington acknowledged Minor did not have the immediate ability to carry out his threat because the deputy had detained him. When Deputy Washington told Teacher what Minor said, Teacher seemed concerned, worried, and frightened.

Minor's Testimony

Minor admitted telling Deputy Washington "I'm going to kill that motherfucker," and he admitted he was referring to Teacher. However, Minor claimed he did not want the deputy to tell Teacher what he said because he did not want to worry Teacher. Minor knew it was possible Deputy Washington would convey what he said, but he denied he was actually planning on killing Teacher. When he made the statement, Minor felt angry and frustrated. Minor had difficulty controlling his anger. Minor acknowledged Deputy Washington previously told him he could get in trouble for threatening staff.

Petition, Jurisdiction, Disposition, and Appeal

Two days after the incident, on October 6, 2016, the Napa County District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) alleging Minor made a criminal threat against Teacher (§ 422, subd. (a)). The petition was amended to add a second count of attempting to make a criminal threat (§§ 422, subd. (a), 664), and a third count for possession of cigarettes by a minor (former § 308, subd. (b)). The juvenile court struck the attempt allegation, and amended the petition to indicate count one related to an alleged threat against Teacher on September 27, 2016, and count two related to the alleged threat on October 4, 2016.

After a contested jurisdiction hearing, the juvenile court did not find true the allegation—in count one of the amended petition—that Minor made a criminal threat against Teacher on September 27, 2016, but it did find true the allegations—in counts two and three—that Minor made a criminal threat against Teacher on October 4, 2016, and unlawfully possessed cigarettes. A few days later, the juvenile court filed a "Memorandum," stating in part that "I ruled that making the threat to a police officer

necessarily includes the inference that the minor would know that the officer will tell the intended victim about the threat, thereby establishing the specific intent that the threat be conveyed to the victim."

At the disposition hearing, Minor sought to reduce the criminal threat offense from a felony to a misdemeanor. Minor argued his inability to control his anger was a problem warranting "mental health assistance," and he pointed out he did not make his threat directly to Teacher, and there was no possibility the threat would be carried out. The juvenile court stated Minor was going to get the same treatment whether his crime was adjudicated a misdemeanor or a felony, and the only question was whether "the Court thinks there needs to be three years of custody potentially hanging over his head." The court granted the request to reduce the offense to a misdemeanor, stating "the threat was made by a person who has perhaps a mental condition that makes it hard for him to control his state."

During the same hearing, Minor objected to two of the probation officer's recommended conditions of probation. The juvenile court altered the language of the electronics search condition, and determined that Minor would be released from juvenile hall upon his entry and participation in the first meeting with Napa County Mental Health Services. The juvenile court declared Minor a ward of the court and adopted the probation officer's other recommendations regarding probation conditions. Minor appeals.

DISCUSSION

On appeal, Minor contends the juvenile court's finding he violated section 422 "must be reversed because he did not state a 'true threat' which would constitute unprotected speech under the First Amendment." Minor also suggests section 422 does not apply because the statute "was enacted to prevent threats made as part of terrorism, stalking, or cyberstalking." Minor argues the juvenile court's electronics search condition is invalid and "unconstitutionally overbroad." We begin with the juvenile court's true finding regarding Minor's unlawful possession of cigarettes.

I.

Minor Did Not Unlawfully Possess Cigarettes

In count three of the amended petition, the Napa County District Attorney charged Minor with unlawful possession of cigarettes "[o]n or about October 4, 2016." At the contested jurisdiction hearing, there was no argument regarding this charge. The juvenile court found the allegation true.

We requested supplemental briefing regarding this adjudication because in May 2016 the Legislature deleted the Penal Code provision making it unlawful for a minor to possess cigarettes. (§ 308, as amended by Stats. 2016, ch. 8, § 8.5.) In its supplemental brief, the Attorney General concedes that, at the time of the incident in October 2016, it was no longer unlawful for a minor to possess cigarettes. Accordingly, we vacate the juvenile court's true finding on count three.

II.

Section 422 Is Not Limited to Threats Made as Part of Terrorism, Stalking, or Cyberstalking

With regard to the juvenile court's true finding on count two, Minor contends section 422 "was enacted to prevent threats made as part of terrorism, stalking, or cyberstalking. However, [Minor's] threat had nothing to do with any of these criminal activities." Minor implies section 422 only applies to threats made in these contexts.

Minor is incorrect. When determining the Legislature's intent, we " ' " 'begin by examining the statute's words, giving them a plain and commonsense meaning.' " ' " (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141 (*Gonzalez*).) Section 422 applies to "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, [and the threat must be] . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat . . . ." (§ 422, subd. (a).) There is nothing in this

language that limits the statute's application to threats made "as part of terrorism, stalking, or cyberstalking."

Furthermore, "[i]n 1988, section 422 was amended and reenacted to prohibit 'criminal' rather than 'terrorist' threats." (*People v. Wilson* (2010) 186 Cal.App.4th 789, 802 (*Wilson*).) In 2000, the Legislature changed the heading of title 11.5 of the Penal Code from "Terrorist Threats" to "Criminal Threats." (*People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 (*Toledo*).) In addition, courts have upheld juvenile court adjudications of section 422 violations in contexts that do not involve terrorism, stalking, or cyberstalking. (See *In re David L.* (1991) 234 Cal.App.3d 1655, 1658–1661 (*David L.*) [minor violated section 422 when he threatened to shoot another student at his school].) We reject Minor's attempt to limit the scope of the statute.

III.

There Was Sufficient Evidence Minor Made a Criminal Threat

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety . . . ,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*Toledo*, *supra*, 26 Cal.4th at pp. 227–228.)

Minor contends there was insufficient evidence to support the second, third, fourth and fifth elements of the offense. We begin with the standard of review.

A. *Standard of Review*

Minor states we should apply "either an independent or substantial evidence standard of review." "Claims challenging the sufficiency of the evidence to uphold a

judgment are generally reviewed under the substantial evidence standard." (*In re George T.* (2004) 33 Cal.4th 620, 630 (*George T.*).) However, "a reviewing court should make an independent examination of the record in a section 422 case when a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat." (*Id.* at p. 632.)

In *George T.*, the minor showed several students a poem he had written, the last lines of which read, "I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!" (*George T.*, *supra*, 33 Cal.4th at p. 625.) The California Supreme Court independently reviewed the record to determine whether the minor's poem was a criminal threat entitled to no First Amendment protection. (*Id.* at p. 634.) The Court found nothing in the poem itself or its surrounding circumstances to indicate it was a criminal threat under section 422. (*Id.* at p. 638.)

Nonetheless, an independent standard of review does not apply in every appeal from a section 422 conviction or adjudication. For example, in *Wilson*, *supra*, 186 Cal.App.4th at pages 804–805, the court evaluated the defendant's challenge to his section 422 conviction using the substantial evidence test, rather than an independent standard of review, because the defendant did not raise a First Amendment argument, and the facts did not implicate the First Amendment. The defendant, a prisoner, while being escorted from his cell to a clinic holding area, stated he would "blast" a correctional officer when released. (*Id.* at pp. 797–798.) The court found the defendant's conviction for making a criminal threat was supported by substantial evidence. (*Id.* at p. 800.)

Similarly here, we apply the substantial evidence standard because Minor does not raise a plausible First Amendment defense. Minor did not make his statement as part of a writing, or class exercise, or as a form of expression otherwise plausibly entitled to First Amendment protection. Rather, he made his statement while being escorted by Deputy Washington to the deputy's office. In the juvenile court, Minor argued his statement to Deputy Washington was "venting" as a result of being caught with cigarettes. On appeal,

Minor makes similar contentions, arguing that "[t]he angry venting of a teenager with serious mental issues . . . does not rise to the level of criminal conduct." These facts do not implicate the First Amendment.

"[T]he goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ." ' " (*In re M.S.* (1995) 10 Cal.4th 698, 710.) Unlike the poem at issue in *George T., supra*, 33 Cal.4th at page 625, Minor's statement to Deputy Washington cannot be construed as creative expression or a form of public dialogue. Thus, we review Minor's challenge to the sufficiency of the evidence using the substantial evidence standard.[2]

Under this standard, " ' "an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt." ' [Citations.] ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*George T., supra*, 33 Cal.4th at pp. 630–631.)

B. *Minor Made the Threat with the Specific Intent that the Statement Be Taken as a Threat*

Regarding the second element of the offense, Minor argues his "emotional outburst" was not intended as a criminal threat. Minor contends the circumstances demonstrate he did not have the specific intent that his statement be taken seriously. Instead, he contends he "made the threat because he had serious mental health problems, including emotional instability that led to verbally threatening people." He also contends

[2] Given our conclusion these facts do not implicate the First Amendment, we reject Minor's suggestion, in his reply brief, that defense counsel was ineffective for failing to raise a First Amendment defense.

he "should not be made a scapegoat due to news about school violence." We are not persuaded.

The evidence of a defendant's specific intent " 'is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' [Citation.] . . . 'We "must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence." ' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) " '[T]he determination whether a defendant intended his words to be taken as a threat . . . can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances.' " (*People v. Butler* (2000) 85 Cal.App.4th 745, 754 (*Butler*).)

In arguing he did not have the specific intent that his statement be taken as a threat, Minor relies on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), but the court's analysis in *Ricky T.* does not support Minor's contentions. In *Ricky T.*, when discussing the minor's alleged threat, the court considered whether the parties had "any prior history of disagreements," and whether the defendant "exhibited a physical show of force." (*Id.* at p. 1138.) Here, these factors support the juvenile court's determination that Minor intended his statement to be taken as a threat.

When Teacher escorted Minor out of the classroom, Minor was "[c]lenching his fists, glaring at [Teacher], muttering, [and] cussing." Teacher had previously seen Minor "punch walls . . . out of anger." While outside the classroom, Minor "hit . . . the school with his elbow extremely hard," making "[a] very loud sound." Teacher considered it a "distinct possibility" Minor could be violent towards him, and Teacher was concerned for his safety because Minor's behavior was escalating from previous experiences with him. Based on this "history of disagreements," and Minor's "physical show of force," it was reasonable for the juvenile court to infer Minor intended his statement to be taken as a threat. (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1138.)

In arguing otherwise, Minor cites *In re Ryan D.* (2002) 100 Cal.App.4th 854, but the case can be distinguished. In *Ryan D.*, for an art project, the minor turned in a painting depicting him shooting an officer who had arrested him a month earlier. (*Id.* at

p. 857.) Reversing the juvenile court's finding that the painting constituted a criminal threat, the *Ryan D.* court explained the painting was ambiguous as an expression of intent, and the minor offered the painting as an art project in school rather than making any effort to ensure the officer would see it. (*Id.* at pp. 863–865.) But here, unlike in *Ryan D.*, there is nothing ambiguous about Minor's statement. He told the deputy "I'm going to kill that motherfucker," and he confirmed he was talking about Teacher. Based on Minor's prior hostile behavior toward teacher, including clenching his fists, and hitting the outside of the classroom, it is reasonable to infer Minor intended Teacher to understand his statement as a threat.[3]

Minor contends he never intended for Deputy Washington to repeat his threat to Teacher. We are not persuaded. In *David L.*, *supra*, 234 Cal.App.3d at page 1658, the court affirmed the juvenile court's section 422 adjudication even though the threats were "relayed to the victim through an intermediary." The court determined it was reasonable to infer the minor intended the third party intermediary to convey the threat to the victim because the third party intermediary was "a friend of the victim who was also witness to certain of the antecedent hostilities." (*Id.* at p. 1659.)

A similar analysis applies here. Deputy Washington testified that he had "several conversations" with Minor about making threats to Teacher and other staff on campus. As the school resource officer, Deputy Washington was "responsible for the safety of the campus, students, and staff." Minor testified he knew it was possible Deputy Washington would convey what he said to Teacher. Based on this evidence, it is reasonable to infer

[3] Minor also discusses an opinion from the Ninth Circuit Court of Appeals, *Lovell v. Poway Unified School Dist.* (9th Cir. 1996) 90 F.3d 367. In *Lovell*, a student was punished for allegedly threatening to shoot a school guidance counselor if the counselor did not change the student's class schedule. (*Id.* at p. 368.) In *Lovell*, there was no clear finding regarding what the student told the counselor, so the Ninth Circuit held the student did not meet her burden of showing her First Amendment rights were violated. (*Id.* at p. 373.) The case does not discuss section 422, and it sheds no light on the question of whether Minor intended for his teacher to understand his statement as a threat.

Minor specifically intended the threat to be conveyed to Teacher. (*David L., supra*, 234 Cal.App.3d at p. 1658.)

Next, in arguing he did not have the specific intent to make a criminal threat, Minor contends he had "mental health issues" or a "history of mental illness." In support of these contentions, Minor relies on Teacher's testimony that he was scared by Minor's statement because Minor displayed "a lack of mental stability over the course of weeks leading up to this." Teacher also testified he believed Minor was suffering some kind of mental health issue, and he was aware Minor had been "referred to social workers and counselors throughout this time."

However, the juvenile court admitted these statements to establish it was reasonable for Teacher to be in sustained fear for his safety, and they were not admitted to show Minor's intent or mental state. As the Attorney General points out, Minor's counsel told the juvenile court he was " 'not arguing that [Minor] is mentally disabled,' " and, at the end of the jurisdiction hearing, the juvenile court found no "evidence of any mental disability." Accordingly, Minor cannot rely on Teacher's testimony regarding his "lack of mental stability" to establish he did not have the specific intent that his statement be taken as a threat.

In his reply brief, Minor relies, for the first time, on information from the probation officer's dispositional report to support his contentions regarding his mental health. Minor discusses statements made by persons including his teacher, school staff, his mother, and members of juvenile hall staff. But this evidence is hearsay, and it would not have been admissible at the jurisdiction hearing. (Welf. & Inst. Code, § 701 ["Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602 . . . ."].) Indeed, it would have been error for the juvenile court to consider this information at the jurisdiction hearing. (Cal. Rules of Court, rule 5.780(c); *In re Gladys R.* (1970) 1 Cal.3d 855, 860.) Thus, Minor cannot rely on this information

in his attempt to undermine the juvenile court's finding he had the specific intent that his statement be taken as a threat.[4]

Even if there was admissible evidence Minor suffered from a condition that made it difficult to control his anger, this fact is not incompatible with, and does not undermine, the conclusion that there was substantial evidence he specifically intended Teacher to understand his statement as a threat. Minor's statement to the deputy was a specific death threat, and Minor confirmed to the deputy he was referring to Teacher. Minor knew it was possible the deputy would tell Teacher what he said. Thus, substantial evidence supports the juvenile court's finding Minor specifically intended Teacher to take his statement as a threat.

C. *Minor's Threat Was Sufficiently Specific and Immediate and Conveyed to Teacher a Gravity of Purpose and an Immediate Prospect of Execution*

Next, Minor contends his threat "lacked the specificity and immediacy requirements of a criminal threat." We disagree.

Minor's statement to Deputy Washington was a specific, clear death threat, and he confirmed he was referring to his teacher. On its face, Minor's statement supports the juvenile court's finding he made a criminal threat. (*Wilson, supra,* 186 Cal.App.4th at p. 806 [" 'A threat is sufficiently specific where it threatens death or great bodily injury.' "].) Coupled with Minor's hostile behavior toward Teacher, we have little difficulty affirming the juvenile court's finding.

Minor misses the point when he argues his statement "lacked specificity as to the time and manner of how he would 'kill' " his teacher. A similar contention was rejected in *Butler, supra,* 85 Cal.App.4th at page 752, where the court found " 'section 422 does not require those details to be expressed.' " Minor points out he had no ability to

[4] In his reply brief, Minor makes factual assertions not support by the record, including that he "was in a school for special needs children." We disregard such statements. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 [rejecting assertions "not supported by any evidence in the record"].) We also reject Minor's speculative assertions that, as a result of an unidentified mental condition, he could not "stop himself" from "violating . . . section 422 on a regular basis."

immediately carry out his threat. But in *Wilson*, *supra*, 186 Cal.App.4th at pages 814 and 819, the court upheld a section 422 conviction even though the defendant was in custody when he made the threat.

Minor suggests the juvenile court "would not have made the true finding under section 422" if it had known earlier about Minor's "mental health problems." This statement mischaracterizes the juvenile court's comments during the disposition hearing. The juvenile court stated "whether [Minor] intended to carry [the threat] out or not is not an element of the crime. And I think that probably, given some mental health considerations, probably – I would not have been able to find beyond a reasonable doubt that he intended to carry out such a thing had there been an element of a crime." This statement simply reiterates the juvenile court's prior conclusion, made at the jurisdiction hearing, that section 422 does not require an immediate ability to carry out the threat. Based on Minor's explicit threat to kill Teacher, and Minor's prior display of hostility toward Teacher, the evidence was sufficient to support the third element of a section 422 violation.

D. *Teacher Was in Sustained Fear and His Fear Was Reasonable*

Minor contends there was insufficient evidence Teacher "reasonably sustained fear." Minor argues the evidence was insufficient because it establishes his conduct "was that of a mentally ill juvenile, not a teenager bent on threatening his teacher." We disagree.

When the deputy conveyed Minor's threat to Teacher, Teacher seemed "worried," "more concerned than he was in the first place," and "frightened." Teacher was concerned about Minor's "menacing, and hostile" behavior because Teacher had previously seen Minor "punch walls . . . out of anger." Prior to making the threat, Minor was "[c]lenching [his] fists, glaring at [Teacher], muttering, [and] cussing." Teacher observed Minor "hit the outside of the school with his elbow extremely hard," making a "very loud sound." Teacher was concerned for his safety because Minor's threatening behavior was escalating from previous experiences with him. Based on this evidence, it

was reasonable for Teacher to be in sustained fear for his safety. Substantial evidence supports the juvenile court's true finding on count two of the amended petition.

IV.

The Electronics Search Condition Is Reasonable and Constitutional

Minor's final arguments focus on one of the juvenile court's probation conditions. Minor argues the electronics search condition is invalid under the *Lent* standard and "unconstitutionally overbroad." As noted by Minor, the law in this area is unsettled, and the California Supreme Court is currently reviewing whether it is error for a court to impose an electronics search condition on a minor as a condition of his probation "when it had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality . . . because it would facilitate his supervision?" But in this case, as we explain *post*, the electronics search condition *is* related to Minor's offense.

A. *The Electronics Search Condition*

Condition number 17 of the probation officer's recommended terms and conditions provided in part as follows: "The minor [shall] submit all electronic devices under [his] control to search and seizure by any law enforcement or probation officer at any time of the day or night with or without a search warrant, arrest warrant, or reasonable suspicion. The minor shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any electronic device as requested by any law enforcement or probation officer."

At the disposition hearing, Minor objected on the ground there was no "causal connection" between his offenses and the recommended condition. The juvenile court modified the second sentence of condition number 17. In the juvenile court's order after hearing, the second sentence of the electronics search condition provided that "[t]he minor shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any electronic device as requested by any law enforcement or probation officer, *in order to gain access into messages or social media that may be found on that device*." (Italics added.)

B. *The Electronics Search Condition Is Reasonable*

Minor argues this electronics search condition is invalid under *Lent* because "there was no connection between the crimes for which [Minor] was arrested and his use of electronic devices." He also contends there is "insufficient evidence that the electronics search condition would prevent future criminality." We disagree with both contentions.

Under *Lent*, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*).)

Here, Minor's attempt to invalidate the electronics search condition fails because he cannot satisfy the first prong of the *Lent* test. The requirement that he provide passwords to allow access to his electronic messages and social media is related to his offense of making a criminal threat against his teacher. This case is similar to *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), where the defendant pleaded no contest to the charges of threatening and resisting a police officer for the benefit of his gang. (*Id.* at pp. 1172, 1176.) The court found probation conditions requiring the defendant to disclose passwords to electronic devices and social media sites "were related to these crimes . . . because they were designed to allow the probation officer to monitor defendant's gang associations and activities." (*Id.* at pp. 1176–1177.) Similarly here, the adjudication against Minor resulted from Minor's *communication* of a threat against his teacher, so a probation condition designed to monitor his electronic *communications* is related to his offense. Based on this connection between Minor's adjudication and the electronics search condition, Minor cannot establish the probation condition is invalid under the first prong of the *Lent* analysis.

In addition, Minor cannot show invalidity under the third prong because a "condition of probation that enables a probation officer to supervise his or her charges effectively" is reasonably related to future criminality. (*Olguin, supra,* 45 Cal.4th at

pp. 380–381.) "In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P.* (2009) 170 Cal.App.4th 95, 100.)

Here, the probation officer's dispositional report indicated Minor's aggressive behavior was an ongoing issue at his school.[5] According to Teacher, Minor made other threats to stab school administrators, he acted aggressively during a physical education class, and Teacher reported Minor came to school "in an agitated stance on a daily basis." Minor told the probation officer he had "multiple incidents of physical altercations" at his prior middle school. Minor had attended his new middle school for approximately eight weeks, and, during that time, he was suspended twice for making threats.

It was not unreasonable for the juvenile court to infer that a minor making threats or acting aggressively at school may engage in similar conduct using electronic devices. Indeed, it was considerations of this kind that prompted the Legislature in 1998 to amend section 422 to include electronic communications. (*Gonzalez*, *supra*, 2 Cal.5th at pp. 1143–1144.) Based on Minor's history of aggressive behavior, it was reasonable for the juvenile court to impose a probation condition that enables law enforcement and his probation officer to monitor his electronic messages and social media communications. (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 585 [finding electronics search condition reasonable "if the facts show [it] will allow the probation department to effectively supervise the defendant to further the dual goals of rehabilitating the defendant and protecting the public"].)

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[5] Hearsay evidence from the probation officer's report is admissible in the dispositional phase of a juvenile delinquency case. (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 244.) The Attorney General also argues Minor's possession of cigarettes and his illegal drug use were factors supporting the reasonableness of the electronics search condition. Given Minor's history of aggressive behavior, we have not relied on these factors.

C. *The Electronics Search Condition Is Not Overbroad*

Next, Minor contends the electronics search condition is "unconstitutionally overbroad." Minor contends we should "either strike it or at least narrow the condition by limiting it to emails and messaging, which may contain threats." The Attorney General responds that Minor's constitutional challenge to the electronics search condition is forfeited, but much of the Attorney General's discussion of forfeiture appears to relate to a different appeal. Thus, we exercise our discretion to reach the issue. (*In re P.O.* (2016) 246 Cal.App.4th 288, 297–298.)

" 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] Under this doctrine, ' " 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' " ' " (*Ebertowski, supra,* 228 Cal.App.4th at p. 1175.)

Here, we are not persuaded the electronics search condition is overbroad because the juvenile court narrowed its scope by adding the language "in order to gain access into messages or social media that may be found on that device." In other words, this electronics search condition limits the types of data that may be searched; law enforcement or the probation officer are only permitted to search the Minor's electronic messages or social media.

Minor complains the probation condition "potentially invades private bank account and medical data that have no relationship with his offenses," and he suggests the search condition should be limited "to emails and messaging, which may contain threats." But Minor does not explain how law enforcement or a probation officer could monitor whether Minor is making threats using electronic devices without access to all of Minor's electronic messages or social media postings. In *Ebertowski, supra,* 228 Cal.App.4th at page 1175, the court rejected the defendant's overbreadth challenge because the court could not conceive how probation conditions requiring the defendant to provide all

passwords to electronic devices and social media sites "could be more closely tailored to" the purpose of assessing defendant's compliance with requirements that he not associate with his gang or display gang insignia. The same reasoning applies here. Minor does not explain, and we cannot conceive, how law enforcement or the probation department could determine whether Minor is using electronic devices to make threats without providing access to all of Minor's electronic messages and social media usage.

While a minor's constitutional rights are "more circumscribed" than an adults (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941), we acknowledge the juvenile court's electronics search condition is likely to result in some invasion of Minor's privacy, but "perfection in such matters is impossible, and . . . practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Based on Minor's history of aggressive behavior and threats, his privacy interest is outweighed by the state's interest in protecting the public. (*Ebertowski, supra,* 228 Cal.App.4th at p. 1176.) Accordingly, we will neither strike this probation condition nor further narrow it.

DISPOSITION

The judgment is affirmed in part and reversed in part. We vacate the true finding on count three of the amended petition because, at the time of this incident, it was not unlawful for Minor to possess cigarettes. We otherwise affirm.

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Jones, P. J.

We concur:

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Simons, J.

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Bruiniers, J.